No. 16057

# United States Court of Appeals

## For the Ninth Circuit

MAX T. EDWARDS and GILBERT EDWARDS, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## APPELLANTS' REPLY BRIEF

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## REFERENCES IN REPLY BRIEF

"App. Br." means Brief of Appellants
"Br." means Brief of Appellee

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## APPELLANTS' REPLY BRIEF

### I. PRELIMINARY OBSERVATIONS

An evaluation of appellee's contentions suggests the propriety of the following observations:

(1) The accuracy of appellants' statement of the case included in App. Br. 1-30 is not challenged; (2) appellee's statement of the case is inadequate and defective because (a) material matters are ignored and corporate entities such as Edwards, Ltd., or Shaveraids, Inc., are improperly ignored in describing acts or events, (b) certain statements are unsupported by, and in certain instances, contrary to the record, (c) appellee's summary with respect to Count XIX (Br. 38-45) is, in various respects, inadequate and inaccurate, (d) appellee particularly fails to differentiate between evidence applicable to Gilbert Edwards and evidence applicable to Max T. Edwards in its claim as to what was proved; (3) appellee's basic legal contention is unsound (Reply Br. 9), (4) certain of appellants' contentions are not even discussed; and (5) appellants reiterate

their reliance on cases cited notwithstanding appellee's claim that decisions are in some cases under prior statutes (Br. 36) and reiterate statements criticised by appellee (Br. 51, 52, 56).

In view of space considerations, no attempt is made to point out and discuss all errors contained in appellee's brief. At this point, however, note is made of the following:

## II. ERRONEOUS STATEMENTS IN APPELLEE'S BRIEF

1. The claim that the sum of $2,000 paid to Gilbert Edwards February 25, 1953 (Ex. 12), was charged as a miscellaneous expense when, in fact, it was *not* so charged (R. 147, App. Br. 4-6, 66-68; Br. 22, 62-63).

2. The claim that appellants still had possession of a $10,000 note from Mrs. Edwards and some money left over from the $36,500 payments on May 7, 1953, when the facts are to the contrary (R. 621) (See Reply Br. 7) (App. Br. 7-8, 30-32, 43, 47, 48; Br. 12, 14, 44, 47, 55).

3. The claim that there was no intention to close the Seattle store when, in fact, the Government's own witness, Ed Ester, testified on cross-examination to the contrary (R. 319, Br. 29-31, 44, 56; App. Br. 9, 33, 44, 45, 52, 55, 56, 60, 67).

4. The claim that each defendant (without attempt to segregate evidence as to each) planned to take over the profitable part of the business free of bad contracts and debts of Edwards Shaver Departments, Inc., when, in fact, the evidence (consistent with innocence) discloses the innocent character of the incorporation of

Shaveraids, Inc., and Cutlaire, Inc. (on February 9, 1953, not, as appellee states, February 18, 1953 (Br. 28)) and the normal efforts of the receiver to sell receivership assets and the normal effort of Shaveraids, Inc., to obtain concessions previously cancelled as against the corporation involved (Br. 21, 22, 40, 41, 43; App. Br. 4, 5, 66, 68, 69).

5. The so-called unexplained shrinkage in assets in 1952 (R. 749) as being due to shipments to Canadian corporations when there is no evidence to that effect, the evidence being that shipments were made, were charged for on a contra account basis (records having always been maintained in Vancouver (R. 525, 756) and Edwards Shaver Electric, Inc., was still indebted to the Canadian corporations at the end of 1952 and at the end of January, 1953 (Br. 18, 39, 42, 43; App. Br. 8-9) (See Reply Br. 15, *infra*).

6. The adverse inferences (as to the nature of the suit involved) sought to be drawn from the $10,000 settlement (Ex. A-29—mutual release precluding the filing of creditors' claims (R. 616) by appellants and others or by the Trustee against appellants and others) (Br. 62) when there is no evidence as to what the complaint covered, or might have covered, *e.g.,* recovery of unlawful preferences (Br. 11, 14, 62-63; App. Br. 13).

7. Claimed false testimony on the part of the appellants when the matter involved, *if* erroneous, could also or as easily be explained as an inadvertence, or an honest mistake committed in the course of interrogation on the stand, and, in any case, not as to a controlling matter on this appeal.[1]

[1]The jury rejected the charges of fraudulent conspiracy and fraudulent transfer (Counts I, II, IV, V, VII, VIII, X, XI, XIII, XIV, XVI, XVII).

The writer of appellee's brief has also made many mistakes—some quite serious—notwithstanding a more leisurely opportunity to avoid them, in the fifty days of preparation from a study of the record (See also Reply Br. 13-20) (Br. 13, *Cf.,* R. 622; 31, 32, 42, 43, 57, 22, 44, 55); yet we make no claim of falsity—merely error. Furthermore, we are not weighing evidence. App. Br. 29 states:

> "Accordingly, defendants' evidence will be relied upon—not to enable the court to weigh conflicting evidence—but rather to show that the government's circumstantial evidence relied on to show the elements of 'knowing and fraudulent,' 'contemplation of bankruptcy' and 'intent to defeat the bankruptcy laws' did *not* negative the innocent character of such circumstantial evidence because of the possible and probable character of such innocence as shown by the defendants' evidence as to what actually transpired. Such a showing will be made to support the defendants' contention that the government failed to establish evidence of guilt, and judgment of acquittal should now be ordered."

This approach is consistent with and in conformity to the approach taken by *Karn v. United States* (9 Cir.) 158 F.2d 568 (Reply Br. 21), and cases relied on by appellee (Br. 37-38).

## APPELLEE'S CONTENTIONS EVALUATED

### Specifications of Error 1, 2, 3 and 10

Appellee makes three principal contentions:

I. That the evidence is sufficient as to all counts; II. That if the evidence is sufficient as to Count XIX, judgment should be affirmed as to all counts; and III.

That as to Max T. Edwards the place of the crime was proved as laid.

**Point I.**

This is not a case of concealment predicated upon unlawful withholding of information concerning the moneys and property described in the Indictment (App. Br. 46-50). Appellee does not claim that it proved ignorance by the trustee or creditors of the material facts involved (App. Br. 12-16; Br. 56-58).

Appellee does not dispute the correctness or applicability of the legal principle (App. Br. 7-8, 30-32, 43, 47, 48) that unless the respective defendants had possession or control of at least part of the money or property described in the concealment counts (III, VI, IX, XII, XV, XVIII, XX, XXI) on May 7, 1953, or thereafter, defendants would not be guilty of the respective concealments charged (App. Br. 30-46) from the trustee (the date of whose appointment was admittedly not shown)[2] or from creditors in a bankruptcy proceeding.[3] Appellee contends, however, that such possession and

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[2] Appellee mistakenly stated below in its interrogation of Max T. Edwards that the Trustee was appointed May 7, 1953 (R. 604), and the District Court erroneously instructed the jury that the trustee was appointed on that date (R. 806-7). This was prejudicial (App. Br. 40; Reply Br. 27).

[3] Concealment must be from "creditors in any bankruptcy proceeding." This means creditors *after*, not before, the filing of the bankruptcy petition. *In re Perkins* (D.N.J.) 40 F.Supp. 114 (1941). The argument as to necessity of possession or control with respect to the Trustee also applies to creditors. Appellee sought conviction on concealment as against the Trustee (R. 169) and appellants' criticism concerning the case made as to the Trustee is still valid. Appellee never proved or even claimed below that there was any concealment from anyone else (R. 169). Now, appellee emphasizes concealment from creditors because of its deficiency of proof as to Trustee, *i.e.*, date of appointment of Trustee and knowledge by appellants thereof. *Rachmil v. United States* (9 Cir.) 43 F.2d 878, 880) (Reply Br. 27).

control were proved, namely, that Max T. Edwards (not Gilbert Edwards) on May 7, 1953, had possession of a $10,000 note indebtedness from his wife and some money besides derived or left over from the $36,500 received by him (Reply Br. 7) (Br. 12, 13, 14, 44, 47, 55). This contention is without warrant in the record.

The fact that Max T. Edwards received repayment of his indebtedness was not concealment even though as a result of later events the repayment constituted a preference, and Max T. Edwards was under no obligation to account for his expenditure of said sum (App. Br. 50, 51; Reply Br. p. 10). Title passed and the money received was his. It was not "property belonging to the estate of the bankrupt" on May 7, 1953. 18 U.S.C. Sec. 152.

Appellee contends, however, that the payments were trust fund payments void under the "trust fund" doctrine and that ownership of the money or property was not changed (Br. 48); and that the money or property or the new form thereof (note) was in the possession of Max T. Edwards; and that, therefore, the requirements of possession and control were met. Appellee completely misconceives the law (Reply Br. 10). That appellee is even wrong in its claim as to the facts on this point is also clear.

The record shows that Mrs. Max T. Edwards purchased an apartment house (Harwood Lodge) for the sum of $45,000 (Ex. A-23) the purchase price being made up partly from a mortgage of $14,563.48 (R. 505); party from her own lot (R. 506); partly from $10,000 borrowed by her from the Imperial Bank of Canada (R. 499, 621) on which loan Max T. Edwards became a guarantor (R. 621; App. Br. 8); a 60-day $5,000 note

payable to the vendor (R. 506, Ex. A-23); a lot belonging to Max T. Edwards (Lot 9, Block 49) for which Mrs. Edwards gave Max T. Edwards a note in the approximate sum of $5,000 (R. 621, Ex. A-24) and approximately $10,000 from Max T. Edwards which came from the above-mentioned sum of $36,500 in repayment of his advances.[4] This $10,000 was actually disbursed in two payments, one of $2,000 (R. 493, Ex. A-18) and one of $8,000 (R. 498, Ex. A-23). Mrs. Edwards did *not* give Mr. Edwards a note for this $10,000 (R. 621). When Max T. Edwards testified that on May 7, 1953, he might have had possession of notes totalling $10,000 (R. 604; Br. 13) he merely meant that he might have had in his custody the $5,000 note payable in 60 days (and apparently paid and returned) and the $5,000 note of his wife for his Lot 9, Block 49 (R. 621-622). Accordingly, even prior to the appointment of the receiver on March 11, 1953, the entire sum of $36,500 had been disbursed and was no longer in the possession or control of Max T. Edwards and, of course, not in the possession or control of Gilbert Edwards.[5]

Appellee claims that Max T. Edwards had some money left on May 7, 1953, out of the $36,500 relying upon Record 605 (Br. 14). All that Record 605 supports is the statement that Mr. Edwards did not remember how much money he had on May 7, 1953. He was not

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[4] Appellee claims that Max T. Edwards received more than he owed and in January and February, 1953, repaid such excess (Br. 51) Cf. App. Br. 9 (R. 122). Appellee's claim, with which we disagree (Reply Br. 15), makes no difference on this point.

[5] See Reply Brief 10 pointing out that the payment of $36,500 did transfer title and that this is not a case of tracing trust assets into other property, the possession of which is sufficient on which to base a charge of concealment. Furthermore, to what count was the claimed $10,000 note or money applicable?

asked if he had any money left out of the $36,500 on that date. Had he been asked, his answer under the record would clearly have been that he did not have any left.

So far as concerns the cash register and adding machine, the claim (Br. 12) that R. 533, 741 supports the assertion that "Appellants each testified . . . that the adding machine and the cash register were in the possession or under the control of Max T. Edwards at all times after May 7, 1951," is misleading as stated.[6] Appellee concedes (Br. 12) that the reference to cash register at R. 533 means adding machine so that neither at R. 533 nor 741 is there testimony that Max T. Edwards or Gilbert Edwards had possession of the cash register.

The evidence is that the cash register was in the possession of Edwards, Ltd., its owner by purchase (App. Br. 32; Br. 12) and that the portable adding machine was not in the possession of Gilbert Edwards after its delivery to Max T. Edwards in February, 1953 (App. Br. 39, 40).

Appellee claims, however, that appellants had control of the cash register and adding machine on May 7, 1953 (Br. 12, 5, 2); but appellee virtually ignores appellants' argument (App. Br. 32-40) showing that neither possession nor control of the cash register was in Max T. Edwards or Gilbert Edwards on May 7, 1953, or there-

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[6] Max T. Edwards wasn't charged with concealing the adding machine. The claim that Gilbert Edwards had possession is predicated upon the testimony of Max T. Edwards that he would have returned the adding machine to Gilbert Edwards if he had asked for it (Br. 12, R. 533). There was no evidence that Gilbert Edwards knew this, although he did testify that the cash register and adding machine were "still available in Vancouver on and after May 7, 1953" (R. 741; App. Br. 34). What he obviously meant was that the cash register and adding machine were there and not that he had control over them.

after, and that Gilbert Edwards had no control of the portable adding machine after February, 1953. Appellee claims that if the evidence relied on by appellee (which while relying on language distorts meaning) was incorrect "it was up to their counsel to show error." This we have done by calling attention to other portions of the record (App. Br. 32-40).[7]

Even if appellee proved possession or control, as claimed, there would still be no crime of concealment because the moneys and cash register paid for and transferred were in payment of debts and, at most, constituted a preferential payment recoverable in a plenary suit (App. Br. 50).[8] Appellee claims that the *Alper* and *Levinson* cases relied on by appellant (App. Br. 50) on this point are distinguishable because of the Washington "trust fund" doctrine, relying upon *Terhune v. Weise,* 132 Wash. 208, 231 Pac. 954.

The jury found that the payment of indebtedness described in the many concealment counts was neither pursuant to a fraudulent conspiracy nor did such payments constitute fraudulent transfers. It should be remembered that a director and officer of a corporation while a fiduciary, is not the trustee of an express trust (*Robinson v. Linfield College,* 42 F.Supp. 147, 155, Affd. (9 Cir.) 136 F.2d 805, cert. den. 320 U.S. 795, 64 S.Ct. 262) and a director and officer who is a sole stock-

[7] The duty of the District Attorney to act impartially and to protect the innocent is well settled. 27 C.J.S. 404, 23 C.J.S. 519. This includes the duty to get at the real facts. *Pell v. State* (Fla.) 122 So. 110, 114.

[8] The trustee instituted suit against the defendants and others, later settled by a payment of $10,000 (Ex. A-29); but the nature of the suit does not appear from the record. Presumably, it could have included (Reply Br. 3) a claim to recover preference payments made.

holder may be a creditor of his own corporation and treated as such (*Briggs & Co. v. Harper Clay Products Co.,* 150 Wash. 235, 272 Pac. 962). The payment by the corporation of such a creditor even though payment be by an interested director or officer is not void, but, like any other unlawful preference, merely voidable and remains in full force and effect until set aside. *Fleming v. Reinhardt,* 153 Wash. 526, 534, 280 Pac. 9; *McElroy v. Puget Sound National Bank,* 157 Wash. 43, 288 Pac. 241; *Bowyer v. Boss Tweed-Clipper Gold Mines, Inc.,* 195 Wash. 25, 40, 79 P.2d 713; 37 C.J.S. 901.

The "trust fund" doctrine is not to be applied to require the acts of an insolvent corporation still operating to be considered a nullity. Vol. 1, Wash. Law Rev., pp. 81-100, "The 'Trust Fund' Theory: A Study in Psychology." None of appellee's cases support it here. But whatever the "trust fund" doctrine may have been, it was completely abrogated on this point by the enactment in 1941 of R.C.W. 23.48.030 reading as follows:

> "23.48.030. *Preference voidable when.* Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by the receiver. No preferences made or suffered prior to such four months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond the four months' period are hereby specifically superseded. [1941 c. 103, §3; Rem. Supp. 1941, §5831-6]"

Appellee then claims that the *Alper* and *Levinson* cases are wrong anyway, citing Collier on Bankruptcy, 14th Ed., §29, pp. 1144-1145. Collier doesn't even discuss

this point and Vol. 9 Remington on Bankruptcy, 6th Ed., §3471, cites the rule that an unlawful preference does not constitute concealment without any attempt to criticize the rule. Appellee's argument that the *Alper* and *Levinson* cases would make it all too easy for a dishonest business to pay sham debts as a preference with no fear of criminal sanctions is pointless. The payment of sham debts would be clearly fraudulent. We are here dealing with honest debts and the rule applicable to honest debts. If the payment of $36,500 and the transfer of the cash register were void acts rather than voidable, they could be ignored and set aside in turn-over proceedings. However, the rule is that preferences and fraudulent transfers are voidable, not void[9] (Br. 51-52) and can only be set aside in a plenary suit. Collier on Bankruptcy, 14th Ed., §23, p. 502.

There being neither possession nor control of the money or property involved proved in the defendants on May 7, 1953, or thereafter, title having passed thereto in December, 1952, January and February, 1953; and in any case the repayment of the indebtedness to Max T. Edwards and the transfer of the cash register for value being at best mere preferences, the evidence was insufficient to constitute the crime of concealment and the convictions on the counts involved should be set aside.[10]

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[9] *Bowyer v. Boss Tweed-Clipper Gold Mines, Inc.*, 195 Wash. 25, 40, 79 P2d 713. Appellee claims that a fraudulent transfer is not a sale. Appellants point out that the sale here is not a fraudulent transfer.

[10] On the issue of the innocent character of the delivery of the portable adding machine by Gilbert Edwards to his brother, Max, in February, 1953 (See App. Br. 45-46) appellee makes no comment.

**Point II.**

Appellee's principal point of reliance on this appeal is that its circumstantial evidence as to Count XIX requires an affirmance of the judgment of conviction on all counts (App. Br. 51-57, 59-61; Br. 38-44).

In evaluating appellee's statement of what the jury could have found from circumstantial evidence (Br. 15, 38-44), appellee's statement not only fails to demonstrate that such circumstances are "inconsistent with every reasonable hypothesis of innocence" (Reply Br. 4, 21), but fails to demonstrate that the transfer of the cash register was made in contemplation of a bankruptcy proceeding (this was Max T. Edwards' first such experience in America (R. 615)) as distinguished from, at best in contemplation of operation by creditors, assignment for the benefit of creditors or receivership (App. Br. 53) and fails to demonstrate that appellants intended to defeat the bankruptcy law, either by showing that the appellants had knowledge of the contents of that law,[12] or a knowledge of a duty imposed thereby (App. Br. 54-55).

Appellee's statement contains a number of erroneous statements and fails to differentiate between evidence as to Max T. Edwards and evidence as to Gilbert Edwards. Gilbert Edwards was an employee and not a stockholder in the bankrupt corporation. Possible mo-

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[11] The court instructed (R. 804): "Such contemplation must be of a petition in Federal bankruptcy, and not merely of insolvency, state receivership or arrangement with creditors."

[12] Appellee claims that knowledge of the bankruptcy law is unnecessary. We never contended otherwise, contending, rather, that knowledge of the bankruptcy law *or* knowledge of a duty imposed thereby was necessary (App. Br. 54-55).

tivation or positions taken pertinent to Max T. Edwards wouldn't necessarily apply to Gilbert, and *vice versa.* Yet appellee constantly uses the word "appellants" when, at best, it should indicate which appellant. See also Reply Br. 2, 12, *supra.* We make the following comments (without attempting all corrections) to help preserve proper perspective.

*Br. p. 39.* The arrangement from the beginning between Edwards Shaver Departments, Inc., and the British Columbia corporations was on a contra account basis (App. Br. 14, 47). Each appellant and the British Columbia corporations pledged his or their credit to raise funds to lend, interest free, to the Washington corporation to enable it to operate (R. 622; App. Br. 6-7).

The Seattle store was in process of being closed when the receiver was appointed (App. Br. 9, 33, 44, 45, 52, 55, 56, 60, 67) even though the $500 a month lease had several years to run. The Los Angeles store also had been closed as a losing venture (R. 338) even though its lease had some time to run (R. 608-609). Furthermore, the liability for rent could be reduced by the amount received from the space from another, so that the liability might even have been nil or would be merely the difference between the rent reserved and the rental value. *Brown v. Hayes,* 92 Wash. 300, 159 Pac. 89. Theoretical profit possibilities claimed by the appellee in a compilation such as appellee's Appendix A (never offered or introduced below as an exhibit and therefore not the subject of cross-examination nor is its accuracy conceded) did not work out in practice (R. 611-12). The

government's witness Ester himself testified to the losses (Reply Br. 16-17). It is therefore untrue to say in effect that the elimination of the unprofitable Seattle location was impossible or that the government showed that the store would not be closed while the rental of $500.00 per month continued to be payable (Br. 56).

*Br. p. 40.* Appellee's statement that "bankruptcy was certain" and that "the inevitable insolvency proceedings could not be had under state law because the commingling of assets and liabilities of the Washington and California corporations prevented any effective liquidation under state law" is not based on evidence that each appellant thought or knew this, but represents the opinion of the writer of appellee's brief as to the state of the law. However, under Washington law, a common law assignee for the benefit of creditors was possible. *United Cigar Stores Company of America v. Florence Shop,* 171 Wash. 267, 17 P.2d 871, or a receiver could have been appointed. *Warren v. Porter Const. Co., Inc.,* 29 Wn.2d 785, 189 P.2d 255; *Snyder v. Yakima Finance Corporation,* 174 Wash. 499, 25 P.2d 108. A common law assignee or receiver could each recover preferences. *Seattle Association of Credit Men v. Green,* 45 Wn. 2d 139, 273 P.2d 513; R.C.W. 23.48.030, *supra.*[13] Just as creditors came up to Washington to enforce their rights

[13] If commingling of assets and liabilities occurred, creditors could disregard corporate entities and prove their claims against the combined assets. See *Platt v. Bradner Co.*, 131 Wash. 573, 579; 230 Pac. 633. Furthermore, creditors could consent thereto just as they raised no objection to consolidating the bankruptcy proceedings of the Washington and California corporations. There was no evidence that either of the defendants were aware of any of the difficulties of the type described by appellee or that bankruptcy was required or that either appellant even considered the possibility of bankruptcy (App. Br. 51).

in bankruptcy proceedings, so they might have come up to Washington to enforce their rights in either common law assignment or receivership proceedings. Furthermore, operation by appellants under the supervision of creditors was also possible as was, indeed, offered by appellants (R. 539-541, 684; App. Br. 10).

The statement that beginning December, 1952, appellants wanted to rid themselves of the contracts and debts and start over with a new corporation is not supported by the record. The jury found the defendants innocent of the charges of conspiracy and fraudulent transfer with respect to the moneys repaid Max T. Edwards in December, 1952, and January, 1953. Gilbert Edwards was not a stockholder of the corporation and there is no evidence whatsoever of his participation in any such plan as that claimed (App. Br. 52-54).

*Br. p. 41.* The statement that the $36,500 was "more than full repayment of money" that Max T. Edwards loaned to the corporation (appellee states approximately $35,000 was owed) (Br. 40) is unsupported by the record and is not a correct statement of how the matter was considered at the time payment was made of the loan account. The advances summarized in Deft. Ex. A-4 (App. Br. 6-9) show a balance owing to Max T. Edwards as late as March 9, 1953. Possibly, appellee is thinking of the separate account of an unpaid stock subscription and Cadillac car in relation to the amounts lent (or paid as appellee contends) in February, 1953 (App. Br. 9). Max T. Edwards paid everything he owed the corporation, even on appellee's theory, by February, 1953 (R. 122).

Appellee's statement of the circumstances surrounding the removal of the furniture and cash register ignores evidence in the government's own case of the plan to close the Seattle store (see App. Br. 2-18, 51-57, 59-61).

The statement as to cancellation of 75% of indebtedness ignores pertinent evidence summarized (App. Br. 9-11) consistent with innocence.

*Br. p. 42.* The statement about holding another California creditor in line "so that it would not throw" the corporation "into some sort of insolvency proceedings" is unsupported by the record. Government witness, Burch, testified (R. 272): "I told them I thought I could hold Horn & Cox off until we came back for the next meeting." There was nothing said about insolvency proceedings or about bankruptcy proceedings. See also R. 267. Max Edwards' testimony that the Horn & Cox suit "was a bolt out of the blue" (App. Br. 11) was justified not only because he believed the claim was against the Washington corporation, not the California corporation (which he considered a separate entity) against which suit was brought (A-26), but because Mr. Burch of Hall & Co. told him he thought he could hold Horn & Cox off "until we came back for the next meeting." Appellee's statement of the circumstances out of which the bankruptcy arose should be read in light of the unchallenged statements (App. Br. 11, *et seq.*).

The statement that there were unexplained large losses in 1952 and that these resulted from shipments of electric razors to one of the Vancouver corporations is unsupported by the record. Appellee's witness, Ester,

the accountant, testified to losses. Instead of asking him to explain the losses, appellee attempted to have appellant, Gilbert Edwards, do so by answering questions on the witness stand on cross-examination, even though Gilbert Edwards pointed out that he was not an accountant (R. 749). Gilbert Edwards relied upon the accountant, Ester, and Ester was the one who could explain the figures which he compiled (R. 748). Furthermore, there is no evidence that the losses were due to shipments of electric razors to one of the Vancouver corporations. The reference to the removal of records concerning shipments to Vancouver ignores the facts summarized (App. Br. 47).

*Br. p. 43.* The statement that appellents falsely testified that the value of shavers sent to Canada was less than the value of cutlery shipped from Canada to Seattle is unsupported by the record (See App. Br. 8-9).

The statement as to date of incorporation of Shaveraids, Inc., is wrong. That corporation was incorporated February 9, 1953, under circumstances reviewed (App. Br. 4-5).

The contention as to intention to take over profitable concessions confuses intention and purpose with unintended and unexpected sequence of events forced by the unexpected filing of the California suit (App. Br. 51-57, 11-13; Reply Br. 15). Repayment of debts and the closing of the Seattle store during the course of which the cash register was sold and conveyed by public conveyance to the buyer and adding machine delivered for use of another officer of the corporation, temporary machine being substituted pending completion of closing opera-

tions (confirmatory of closing), is entirely consistent with innocence (Reply Br. 20).

*Br. p. 43.* The statement "money for Shaveraids, Inc., came from the bank account of Edwards Shaver Departments, Inc.," assumes erroneously that the $2,000 paid to Gilbert Edwards (App. Br. 66) was charged as a miscellaneous expense (Reply Br. 2, *supra*). The record shows that while distributed to the miscellaneous account it had "not been charged to any specific account" (R. 147). The accountant, Ester, explained that he hadn't gotten around to making the necessary postings (App. Br. 14).

The statement that "it was appellants' intention to buy up assets of the bankrupt at distress sale" when the cash register was transferred, is unsupported by the record. There is no such evidence. The statement as to what Shaveraids, Inc., did, ignores the circumstances of its incorporation (App. Br. 4-5) and its utilization for reasons of economy in the purchase of receivership assets (R. 688; App. Br. 12).

*Br. p. 44.* The statement that some of the proceeds of the $36,500 paid was still in Max Edwards' possession after May 7, 1953, is utterly unsupported in the record (Reply Br. 7).

The statement that appellants have kept property of the bankrupt, including cash register, furniture, adding machine, is unsupported by the record and is a serious error. The cash register and furniture were paid for by Edwards, Ltd., for a total charge of $251 (Ex. A-34, App. Br. 17). The statement as to trade names if intended to refer to Shaveraids or Cutlaire as private

brand names undoubtedly meant the names used by Shaveraids, Inc., and Cutlaire, Inc., organized February 9, 1953 (App. Br. 5). If that is so, appellee possibly assumes, without evidence, that the names were copyrighted or registered in some fashion; or assumes without evidence that Shaveraids, Inc., didn't have or acquire the right to the use of the name either after incorporation February 9, 1953, or as a result of the receivership sale (App. Br. 12, 68; R. 368, 553); or assumes some objection made and disregarded. Just what each appellant should have done to vest title to the unregistered trade name in the bankrupt on May 7, 1953, isn't clear. There is no claim that either appellant could have or refused on request to do so. On the contrary, cooperation was shown (App. Br. 12). As to records relating to concession possibilities appellee does not explain what is meant by the word "records." Possibly, appellee means correspondence such as that introduced in evidence below. There is no claim that such correspondence constituted contracts, or had any salable value or other value to creditors.

The statement that appellants falsely testified that the reason the cash register was shipped to Canada was that the store was being closed is unsupported by the record. Appellee cannot disregard the evidence of its own witness, Mr. Ester, who testified to the plan in 1952 to sell the Seattle store or to close it (R. 319). Since the effort to sell was fruitless (App. Br. 9) there was no alternative but to close it (as also testified to by appellants) (App. Br. 9, 33, 44, 45, 52, 55, 56, 60, 67).

In any case, the inferences claimed must show the

transfer of the cash register February 20, 1953, to be "in contemplation of a bankruptcy proceeding" and "with intent to violate the bankruptcy law."

After reviewing appellee's statement (Br. 38-45) it is to be noted appellee does not challenge appellants' statement (App. Br. 51):

> "There was no evidence of discussion, consideration or contemplation in fact of bankruptcy at the time of the transfer [Attorney Sharp testified that he wasn't even consulted by either of the Edwards relative to bankruptcy prior to May 7, 1953." (R. 668)].

At best, if there was contemplation of anything, it was a contemplation of a state of insolvency, or operation under supervision of creditors. This is not enough (App. Br. 53). In any case, we have here a transfer for value on February 20, 1953, consistent with innocence; not a transfer at a time when the thought of bankruptcy was the impelling cause thereof. There were no pending negotiations to prevent bankruptcy (*Cf. Conrad, Rubin & Lesser v. Pender,* 289 U.S. 472, 77 L.ed. 1327, 53 S.Ct. 703) and the transfer had been contemplated and was pursuant to a 1952 plan to close the unprofitable Seattle store (but continuing in business) (App. Br. 9, 33, 44, 45, 55, 56, 60, 67). There was nothing secret or concealed about the transfer. As pointed out in *Wolf v. U.S.* (4 Cir.) 238 Fed. 902, 905, in reversing a conviction of concealment against one of two brothers: " * * * it is certainly a tax on credulity to suppose that he would openly engage in sending, by public conveyance, trunks of merchandise from that stock to his own store at Johnsons * * * the circumstances of which so much is

sought to be made is fully consistent with an honest purpose; it is absolutely inconsistent with criminal intent." This is especially true here in view of the evidence that the business was continuing with plans for expansion (App. Br. 4-5, A-25) and only seven days before, Max T. Edwards had lent $1,000 to the company for its continued operation (2-13-53, R. 772, App. Br. 9).

Furthermore, appellee makes no claim that either defendant knew that in transferring the cash register for value back in February, 1953, under the circumstances shown, that they were violating any duty imposed by law of which they had any knowledge (App. Br. 55; Reply Br. 12).

Appellee's statement of what the jury could have found from circumstantial evidence not only relies upon conjecture, and inference contrary to evidence, but fails to point out evidence in the record which shows that the inferences claimed are not inconsistent with innocence, *Karn v. U.S.* (9 Cir.) 158 F.2d 568, 570. The court, in reversing the conviction below on account of insufficient evidence, stated:

> "The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. 23 C.J.S. Criminal Law, § 907, pp. 151, 152; *Paddock v. United States,* 9 Cir., 1935, 79 F.

2d 872, 876; *Ferris v. United States,* 9 Cir., 1930, 40 F.2d 837, 840."

Appellee's claim (App. Br. 57-58) that concealment need not continue throughout the course of bankruptcy proceedings, but may take place upon the occurrence of bankruptcy (Br. 57) without even permitting a reasonable time to comply with the law (App. Br. 50)[14] is at least an open question in this circuit (*Rachmil v. United States* (9 Cir.) 43 F.2d 878, 880 (quoting with approval from *Gretsch v. United States* (3 Cir.) 231 Fed. 57, 62) " 'Unless concealment lasts, it ceases to be concealment'." and appellee's cases do not support it (Br. 57-58). However, appellants contend (App. Br. 50) that there never was concealment at any time, either before or after bankruptcy (See also App. Br. 46-50).

In the following concealment cases the government's evidence of fraudulent concealment, while tending to prove guilt, was nevertheless held insufficient. *U.S. v. Tatcher* (3 Cir.) 131 F.2d 1002, reversing District Court (Unexplained missing merchandise within two and one-half months of bankruptcy); *Wolf v. U.S.* (4 Cir.) 238 Fed. 902, 905, reversing District Court (Defendant officer's frequent visits to corporation's store where he might have obtained knowledge of concealment); *Reimer-Gross Co. v. U.S.* (6 Cir.) 20 F.2d 36, reversing District Court (Evidence of shortage in year preceding bankruptcy); *U.S. v. Pokrass* (D.C. Pa.) 32 F.Supp. 283 (Wide discrepancy between cost of mer-

[14]The rule contended for by appellee doesn't give a person even a reasonable time to comply. How and to whom is a person to deliver up or disclose property when all creditors with provable claims cannot be known until later (Reply Br. 5); when no trustee is known; when adjudication may not even take place after the filing of the petition?

chandise purchased by bankrupt and amount of money deposited in bank by bankrupt together with small amount of merchandise on hand), and *U.S. v. Lowenstein* (D.C. Pa.) 126 Fed. 884 (Improper payment of creditors by bankrupt after bankruptcy petition filed with money received from debtors).

**Point III.**

Appellants' contention that venue as to Max Edwards was not proved (App. Br. 57-58) is attempted to be "completely answered by Sections 2, 3237 and 3238 of Title 18 U.S.C..* * * " (Br. 60) (Reply Br. 5).

Appellee overlooks the fact that Max T. Edwards was and is a long-time resident of Vancouver, B.C. (App. Br. 2, R. 444-446). Appellee made no attempt to prove Max T. Edwards to be an American citizen, and does not challenge appellants' statement that he was a Canadian subject (App. Br. 2, 57, 58).

18 U.S.C. Sec. 3238 has no application to crimes committed by Canadian citizens in Canada (*U.S. v. Baker,* 136 F.Supp. 546). Sec. 3237 only applies to crimes committed in more than one district. British Columbia is not a district of the United States. Section 2 defines "principal" in terms of one who aids or procures the commission of a crime or causes it to be done. There is no evidence that Max T. Edwards procured Gilbert Edwards to commit the crime of concealment or fraudulent transfer. Furthermore, the act of aiding and abetting, if any there be, took place in British Columbia, not in the United States so as to the give the District Court Jurisdiction (App. Br. 57, 58).

**Specification of Error No. 4**

Appellee's sole response to appellants' argument on this point (App. Br. 62; Br. 61) is that if evidence is sufficient as to Count XIX, affirmance is required as to the other counts regardless of how insufficient the evidence as to such other counts may be.

The rule that an appellate court need not notice errors in other counts if there is no error with respect to at least one count in the case of concurrent sentences, is not mandatory; it is merely discretionary.

What appellee is asking this court to do is to affirm a judgment of conviction on eight counts, not because of guilt on those counts, but because of claimed guilt on Count XIX. This is urging a conviction of separate crimes involving $36,500 and an adding machine, because of claimed guilt of a different crime, namely, transfer of a $126 cash register, with resulting respective prison sentences of three years and two years. Furthermore, appellee ignores the principle that a defendant unfairly convicted by evidence which was admitted as to insufficient counts dealing with fraudulent concealment (and much of which evidence would not be admissible are too remote as to Count XIX), requires that a new trial be granted (App. Br. 29-30, 62-65).

Here, the not guilty verdict on the conspiracy and fraudulent transfer counts, which charged that the conspiracy and transfers were made "in contemplation of a bankruptcy proceeding" and "with intent to defeat the bankruptcy law" makes all the less comprehensible the jury's contrary view on these points with respect to Count XIX. This fact points to the prejudicial effect

of immaterial and remote evidence which would have been inadmissible if Count XIX involving the claimed fraudulent transfer of the $126 cash register on February 20, 1953, were alone presented to the jury under proper instructions.

**Specifications of Error Nos. 5, 6, 7 (Br. 61-64; App. Br. 65-69)**

Appellee claims that the request by Max T. Edwards (acting under his attorneys' advice) addressed to the Washington Court Receiver to return the records of the California corporation, for whom he was not receiver, to Mr. Edwards' attorneys (Spec. Err. No. 5); the payment of $2,000 to Gilbert Edwards (Spec. Err. No. 6); and evidence of the sale by the Receiver of certain receivership assets to Shaveraids, Inc. (Spec. Err. No. 7) were "proof of appellants' intent," *i.e.,* that they evidenced a plan to take over the profitable part of the shaver concession business free of the old contracts and burdens of Edwards Shaver Departments, Inc. Appellee's conjectures and suspicion on this point were apparently rejected by the jury in the fraudulent conspiracy and transfer counts (Reply Br. 21). The evidence admitted did not show that either defendant had knowledge of any duty imposed by the Bankruptcy Law, which prohibited the request for California records; or the payment of the sum of $2,000 to Gilbert Edwards, $1,800 being a repayment of a noninterest bearing loan, and $200 being an advance ultimately released (Ex. A-29) Reply Br. 18, *supra*); or which prohibited Shaveraids, Inc. from making a purchase at a receivership sale made at the request of the Bon Marche (R. 372) and no impropriety being shown or claimed

on or in connection with the sale (R. 365). The foregoing evidence was not only not admissible with respect to Count XIX; it was inadmissible with respect to the remaining counts of the Indictment.

**Specification of Error No. 8 (Br. 63-64; App. Br. 69)**

Appellee contends that evidence of amount paid to creditors in the receivership and bankruptcy proceedings showed what would be realized on forced sale to creditors. Appellee made no attempt to show what the receivership or trustee expenses were or what they should be. Furthermore, evidence as to what was realized at some unproved date subsequent to February, 1953, could hardly be related back to concealments so-called of the payments made in December and January preceding and of the transfer of the cash register and the delivery of the portable adding machine in February, 1953. The evidence claimed was not only highly remote, but prejudicial.

**Specification of Error No. 9 (Br. 64; App. Br. 70)**

Appellee claims that the court rejected Ex. A-22 in the exercise of discretion which appellee now admits the court had (Br. 64). No such admission was made to the District Court. We submit that a fair reading of the record shows that the court never exercised his discretion because he never recognized that he had such discretion. The error and prejudice resulting from the refusal to admit the exhibit, enhanced by appellee's claims on the matter of accounting for the expenditure of the $36,500, was not saved by appellee's willingness to consent to the introduction of the exhibit by imposing unacceptable conditions. The District Court didn't

exercise the discretion he should have exercised. (See analogy, *Kirk v. United States* (9 Cir.) 185 F.2d 185, p. 189).

**Specification of Error No. 10 (Br. 65; App. Br. 72)**

Appellee's argument that Motion for New Trial is reviewable for abuse of discretion is not answered. If this court determines that instead of itself granting a new trial on this point the case should be remanded to enable the District Court to consider the motion anew in light of this court's opinion (analogy, *Heald v. United States* (10 Cir.) 175 F.2d 878, p. 883, affd. 338 U.S. 859, 70 S.Ct. 101), attention could also be called to the following (App. Br. 74).

The court below twice erroneously instructed the jury that the Trustee was appointed May 7, 1953 (R. 806, 807) (Reply Br. 5). At the same time he instructed the jury (R. 807):

> "Property cannot be concealed from a bankruptcy trustee until he is appointed to that position after the commencement of bankruptcy proceedings."

The jury might have found the defendants guilty of concealment from the Trustee on May 7, 1953, when, in fact, not only is that date wrong, but there is no evidence as to when the Trustee was appointed and there is no evidence as to when appellants first acquired knowledge of such appointment. This prejudice remains even though the Indictment also charged concealment from creditors, since there is no way of knowing the basis for the jury's verdict. The fact that no exceptions were taken does not, in view of Rule 52b, prevent this court from noticing this error in arriving at a determination

as to whether a fair trial was had (See *Herzog v. United States* (9 Cir.) 235 F.2d 664; App. Br. 72-76).

## CONCLUSION

Appellee's attempt here is to obtain affirmance of convictions as to eight counts and, if possible, without examination and review of those counts notwithstanding the serious claim of appellants that evidence as to these counts was insufficient (Reply Br. 5) and prejudicial as to other counts (Reply Br. 24). This attempt is predicated on circumstantial evidence with respect to Count XIX insufficient and wholly consistent with innocence (Reply Br. 12). On top of this, errors in admissions or rejection of evidence prejudiced appellants even more (Reply Br. 25-7). The failure of the District Court to instruct the jury on material legal points and the erroneous instructions on the matter of the Trustee's appointment, even though unexcepted to, is in light of all the facts, the kind of error or defect preventing a fair trial that Rule 52b was intended to protect against (Reply Br. 27). Under these circumstances, the three-year and two-year prison sentences (whose severity is not challenged by appellee) invite review of the matters complained of.

The judgment should be reversed with directions to enter judgment of acquittal, or, alternatively, to order a new trial. This should be done as to each appellant.

Respectfully submitted,

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